No. 12522

# In the United States Court of Appeals for the Ninth Circuit

GRACE HARTLEY EMERY ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, APPELLEE

## BRIEF FOR APPELLEE


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### JURISDICTION

This appeal is from a final judgment of the United States District Court for the Southern District of California, Central Division, granting a motion for judgment on the pleadings in an action under the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 901, et seq.) and the Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. 1881, et seq.) for injunctive relief and restitution of rental overcharges. Judgment was entered on December 21, 1949 (R. 34–37). Notice of Appeal from this judgment was filed on March 15, 1950 (R. 42). Jurisdiction of the District Court was invoked pursuant to Section 205 (a) of the Emergency Price Control Act of 1942, as amended, and Sections 205, 206 (b) and 206 (c) of the Housing and Rent Act of 1947, as amended (R. 2). Juris-

diction of this Court is conferred by Section 1291 of the Judicial Code (28 U. S. C. 1291).

## COUNTERSTATEMENT OF FACTS

The appellee, under the provisions of Section 205 (a) of the Emergency Price Control Act and Sections 205 and 206 of the Housing and Rent Act of 1947, as amended, filed its Complaint (R. 2–6) against appellants herein, seeking statutory damages, injunctive relief and restitution of rental overcharges received from tenants of appellants' accommodations located in Los Angeles, California. To this complaint, appellants filed a Motion to Dismiss (R. 7). The Motion to Dismiss was denied (R. 13) (See *United States* v. *Emery,* 86 F. Supp. 354). Appellants filed their Answer to plaintiff's Complaint (R. 22–24). The answer did not deny any of the allegations charging violation. It merely set forth eight separate defenses (R. 23) which, to the extent not abandoned upon this appeal, will be discussed hereafter. Appellee herein thereafter filed a motion for a judgment on the pleadings (R. 24–26). After a hearing, the trial court granted appellee's motion and entered a judgment for the appellants in the sum of $1,002.50 as restitution to be disbursed by the plaintiff to certain tenants named in the order of judgment (R. 34–37). The appellants herein appeal from this final judgment (R. 41), and assert the following grounds for reversal:

> 1. That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on

behalf of a tenant against a landlord is unconstitutional.

2. That if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied restrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945.

3. That the four tenant beneficiaries who occupied two rental units were indispensable parties plaintiff.

4. The trial court erred in granting summary judgment against appellants.

5. That the trial court erred in denying appellants' motion to alter or amend the judgment under review.

6. That the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money.

7. That the United States Attorney under Section 507 of the United States Code Judiciary and Judicial Procedure was required to appear for plaintiff.

## ARGUMENT

## I

**There is no merit to appellants' first contention that Section 204 of the Housing and Rent Act of 1949 purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is unconstitutional**

Appellants' first contention is "That Section 204 of the Housing and Rent Act of 1949, purporting to give the United States the right to maintain a civil action on behalf of a tenant against a landlord is un-

constitutional." There is no merit to this contention.

Section 204 of the Act of 1949 (*infra,* p. 17) amended Section 205 of the Housing and Rent Act of 1947, as amended. It confers upon the United States a right to sue for *statutory damages* in the event the tenant fails to sue within thirty days (See *Woods* v. *Gianoulis,* — F. 2d — (not yet reported) (C. A. 3d). Since the judgment below does not award any statutory damages under Section 205 but merely restitution of overcharges pursuant to Section 206 (b) of the Act, appellants' objection or challenge to Section 205 is pointless upon this appeal.

## II

**There is equally no merit to appellants' second contention "that if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied retrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945"**

Equally lacking in merit is appellants' contention "that if said Section 204 is constitutional it became effective on May 1, 1949, and could not be applied restrospectively, as it was in the judgment under review, to a period beginning with January 7, 1945."

What has been said above under Point I is likewise dispositive of appellants' second contention. We are not dealing here with Section 205, as amended by Section 204 of the Act of 1949, as appellants assert. Consideration of the validity of Section 205 must await a case in which judgment has been awarded under that section. Here judgment has been granted pursuant to Section 206 (b) of the 1947 Act for

restitution on account of overcharges received by appellants since January 7, 1945. Recovery by the Government of overcharges for this period by way of restitution is not, however, unlawful, nor does it violate any constitutional rights. On the contrary, the courts have unanimously given effect to this remedy to compel a wrongdoer to disgorge his unlawful gain. The passage of time from the violation to the time of suit does not alter the rule. It is well settled that neither the statute of limitations nor the doctrine of laches may bar the restitution suit by the Government to bring about effective compliance with the Act. (See *Porter* v. *Warner Holding Co.,* 328 U. S. 395; *Woods* v. *McCord,* 175 F. 2d 919 (C. A. 9th); *Woods* v. *Wayne,* 177 F. 2d 259 (C. A. 9th); *Woods* v. *Gochnour,* 177 F. 2d 764 (C. A. 9th); *Woods* v. *Richman,* 174 F. 2d 614 (C. A. 9th); *Brooks* v. *Woods,* 181 F. 2d 716 (C. A. 9th); *Woods* v. *Wolfe,* 182 F. 2d 516 (C. A. 3rd); *Ebeling* v. *Woods,* 175 F. 2d 242 (C. A. 3rd); *Woods* v. *Bomboy,* 179 F. 2d 565 (C. A. 3rd); *Creedon* v. *Randolph,* 165 F. 2d 918 (C. A. 5th); *Woods* v. *Witzke,* 174 F. 2d 855 (C. A. 6th). In view of these authorities, further discussion of this point would appear to be unnecessary.[1]

[1] For the reasons mentioned above, appellants' reliance upon Judge Rodney's discussion in 9 F. R. D. 501 on statutory damages is likewise immaterial. The *Gianoulis* decision, 86 F. Supp. 933 decided by Judge Rodney, deals with statutory damages, not restitution, and it was reversed by the Third Circuit — F. —. From Judge Rodney's discussion of the restitution remedy (9 F. R. D. 504) it does not appear that his views are contrary to those expressed in the opinions rendered by this and other courts of high distinction.

## III

**There is no merit whatever to the contention that the four tenant beneficiaries were indispensable parties plaintiff**

Appellants' third contention is that the four tenant beneficiaries who occupied the housing accommodations involved in the suit were indispensable party plaintiffs. In this connection, appellant's reliance upon Section 367 of the Code of Civil Procedure is wholly misplaced. This is a statutory action brought by the United Statutes pursuant to federal law as to which federal rather that State statutes, must control. The restitution suit is brought pursuant to Section 205 (a) of the 1942 Act and Section 206 (b) of the 1947 Act. The tenants have no authority to invoke either of these sections (cf. *Hock* v. *250 Northern Avenue Corp.,* 142 F. 2d 435 (C. R. 2d)), hence they could not possibly be indispensable parties.

The authority under Section 205 (a) of the 1942 Act is conferred solely upon the Expediter to sue for relief. Similar language is employed in Section 206 (b) of the 1947 Act to sue in his sole discretion (*infra,* p. 15). "Whenever in the judgment of the Housing Expediter" violation is threatened or has occurred, "the United States may make application * * * for an order enjoining such acts or practices * * *" (Sec. 206 (b)) (*infra,* p. 15). In suing for restitution under either the 1942 or 1947 statutes, the Housing Expediter acts in the public interest; the tenants' rights in these suits are merely incidental (*Creedon* v. *Randolph,* 165 F. 2d 918–9 (C. A. 5th); *Ebeling* v. *Woods,* 175 F. 2d 242, 245

(C. A. 8th); *Bowles* v. *Skaggs,* 151 F. 2d 817, 821 (C. A. 6th)).

It is true, of course, that in an action for restitution of overcharges under either Section 205 (a) of the 1942 Act or Section 206 (b) of the 1947 Act, the trial court may, in the exercise of its equity powers, make tenants parties to the action so that conflicting claims between them and the landlord as to counterclaims or offsets may be determined at one time. *Porter* v. *Warner Holding Company,* 328 U. S. 395, 403.

So here, too, appellants could have moved under Rules 13 (*infra,* p. 18) and 14 of the Federal Rules of Civil Procedure, to bring the tenants in as additional parties. However, appellants did not take that course which was open to them. Instead they persisted in their view that the tenants were indispensable parties. Accordingly, the trial court was clearly right in overruling this objection. (Cf. *Co-Efficient Foundation Co.* v. *Woods,* 171 F. 2d 69 (C. A. 5th); *McCoy* v. *Woods,* 177 F. 2d 355, 356 (C. A. 4th)).

## IV

**Contrary to appellants' fourth contention, the trial court was right in granting judgment upon the pleadings**

Appellants next contend the Court below erred in granting judgment upon the pleadings (designated summary judgment by appellant). There is no valid basis for this claim.

The complaint charged appellant with violating the provisions of the Acts of 1942 and 1947, by demanding, accepting and receiving from tenants named in

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a Schedule attached to the Complaint, rents in excess of the maximum rents established pursuant to the Acts (R. 2–6).

To this Complaint, appellants filed a Motion to Dismiss (R. 7) which Motion was denied by the trial court (R. 14–17) (*U. S.* v. *Emery,* 86 F. Supp. 354).[2] Appellants thereupon attempted to obtain leave to file a second Motion to Dismiss (R. 10–19) which application was likewise dismissed (R. 22). Thereupon, appellants filed their Answer to appellee's Complaint (R. 22–24).

The answer contains no denial of the allegations of violation. It merely sets forth eight legal defenses as a bar to suit (R. 22–23).

Appellee filed a motion for a judgment on the pleadings under the provisions of Rule 12 (c) of the Federal Rules of Civil Procedure (28 U. S. C. A. following Sec. 723c). This motion came on for argument. Appellee waived his right for a judgment as prayed for in paragraph C, 1, 2, 3, and 4 of his Complaint which was concerned with statutory damages (R. 5–6). The Court found that the defenses set forth in appellants' answer did not constitute valid defenses to the allegations of the Complaint and that appellee is entitled to a judgment on the undisputed facts. It thereupon ordered judgment of restitution in the sum of $1,002.50, to be disbursed to the tenants named in the Complaint and in the order of judgment.

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[2] The views expressed by Judge Yankwich respecting the validity of the Act of 1949 were subsequently upheld by the Supreme Court in *United States* v. *Shoreline Cooperative Apartments, Inc.*, 338 U. S. 897.

The rule is established that a motion for judgment upon the pleadings admits all facts, well pleaded, but does not admit conclusions of law (*Rosenhan* v. *United States,* 131 F. 2d 932 (C. A. 10th).

Examination of the defenses raised in appellants' answer fails to disclose any allegation of material fact as to which there was any dispute. From appellants' failure to deny the allegations contained in Paragraph V of the Complaint (R. 3–4), appellant must be deemed to have admitted making each of the overcharges set forth in the schedule attached to the complaint (R. 6). The defenses raised by answer do not challenge the correctness of any part of this Schedule. The defenses raise only legal issues, which may and should more properly be disposed of by motions for judgment on the pleadings than by needless trial.

## V

**There was no error by the trial court in its dismissal of defendants' motion to amend the judgment under review**

While appellants in their brief have elected to abandon any extended form of argument on the point (Br. p. 12), they still contend that the judgment below is in violation of Rule 54 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A. fol. 723c) which reads in part as follows:

> (a) *Definition; Form.*—"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Defendants claim that Lines 20–28 in the order of judgment, including the word "and", should be stricken by reason of this rule. If there was any error in incorporating these particular lines in the order of judgment, which this appellee will not concede, it has not been shown how this language affects any of the substantial rights of these appellants, nor has it been shown that they have been prejudiced in any manner whatsoever. The most that can be said if there was error, is that it is harmless, and in no manner affects the final judgment.

Rule 61 of the Federal Rules of Civil Procedure (Title 28, U. S. C. A. fol. 723c) admonishes the trial court to disregard any error or defect in the proceedings which does not affect the substantial rights of the parties. While this admonition is directed to the District Courts, the principle is one which has consistently found favor with appellate courts (*University City Mo.* v. *Home Fire & Marine Ins. Co.*, 114 F. 2d 288, 294 (C. A. 8th); *De Santa* v. *Nehi Co.*, 171 F. 2d 696, 698 (C. A. 2d).

## VI

**There is no merit to the contention that the judgment entered is "legislative instead of judicial"**

Patently lacking in merit is the contention "that the judgment entered is legislative instead of judicial in that it adjudges place of payment, form of payment, excluding the most common means of cash, and forfeiture of tenants' rights to the money." The long-standing practice adopted by almost all district courts

of paying unclaimed restitution refunds to the Treasury is a most practicable one. It enables tenants who have moved upon their later return to apply to the Treasury Department, and to obtain with a minimum of time and trouble the restitution payments allocated to them by a judgment. We fail to see any error whatever in the judgment on this score. Contrary to appellants' contention, the provisions of the judgment were well within the sound exercise of equitable discretion of the trial court. They were also most appropriate both for bringing about complete compliance with the Act and for preventing a violator from benefitting from his own wrong.

## VII

**There is no merit to the contention that the United States Attorney General under Section 507, Title 28, U. S. C. A., was required by law to appear for the plaintiff**

Finally, appellants contend that the United States Attorney General was without power to delegate to the attorneys appointed by the Housing Expediter authority to appear for and represent the United States in any cases arising under this Act.

Section 507 (b) of Title 28, U. S. C. A., relied upon by appellants, provides as follows:

> (b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under Section 503 of this title, in the discharge of their respective duties.

If there is any doubt as to the power of the Attorney General to delegate in this case, it is resolved both by Section 503 of Title 28 U. S. C. and also by the explicit language of the Housing and Rent Act of 1947, as amended. Sec. 503 of Title 28 U. S. C. provides:

> § 503. *Appointment of attorneys.*—The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

Further authority for the Attorney General to grant and delegate to the Office of the Housing Expediter his power to represent the United States in actions arising under the Housing and Rent Act is found in Section 206 (e) of the Act which reads as follows:

> (e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

In the light of these sections, it is specious to contend that the delegation of the United States Attorney General, dated September 24, 1949 (14 F. R. 6097) which confers upon the attorneys appointed by the Housing Expediter the right to represent the United States in any case arising under Sections

205 or 206 of the Housing and Rent Act of 1947, as amended, is without power and effect. What appellants are endeavoring to say is that the Congress of the United States is without power to designate what attorneys shall represent the Government. Similar contention was advanced and rejected in *Case* v. *Bowles,* 327 U. S. 92, 96, affirming *Bowles* v. *Case,* 149 F. 2d 777 (C. A. 9). In that case the State of Washington urged that the complaint filed by the Price Administrator should be dismissed because it was signed by attorneys employed by the Price Administrator and not by the District Attorney or employees of the Department of Justice. Holding this contention to be untenable, the Supreme Court adopting the view previously expressed by the Court in its opinion below, said the following (p. 96–97):

> * * * True, 28 U. S. C. 485 makes it the duty of every district attorney to prosecute most civil actions to which the United States is a party. But this section does not prescribe the procedure under the Emergency Price Control Act for that Act specifically empowers the Administrator to commence actions such as this one and authorizes attorneys employed by him to represent him in such actions, § 201 (a).

So here, too, 28 U. S. C., Section 485 does not prescribe the procedure under the Housing and Rent Act of 1947, as amended, for that Act also specifically empowers the Expediter to commence actions such as this one under such authority as may be granted by the Attorney General.

## CONCLUSION

It is respectfully submitted that the grounds for reversal relied on by appellants are wholly without merit and the judgment of the District Court should be affirmed.

Respectfully submitted.

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## APPENDIX

(1) Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 901, et seq.):

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(2) Housing and Rent Act of 1947 (P. L. 129, 80th Cong., 1st Sess.):

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.



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(3) Housing and Rent Act of 1947, as amended (50 U. S. C. A. App. 1881, et seq.):

RECOVERY OF DAMAGES BY TENANT

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation

with respect to the same plaintiff prior to the institution of the action in which such judgment was rendered.

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(4) Housing and Rent Act of 1947, as amended (P. L. 31, 81st Cong., 1st Sess.):

SEC. 204. (a) Section 205 of the Housing and Rent Act of 1947, as amended, is amended by striking out from the heading of such section the words "BY TENANTS"; by inserting after the words "receives such payment", in the first sentence, the following: "(or shall be liable to the United States as hereinafter provided)"; and by changing the period at the end of the second sentence to a colon and inserting: "*Provided,* That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, and received shall thereafter be barred from bringing an action for the same violation or violations."

Section 206 of the Housing and Rent Act of 1947, as amended, is amended to read as follows:

(c) Any proceeding brought in a Federal court under section 205 or under subsection (b) of this section may be brought in any district in which any part of any act or transaction constituting the violation occurred, or may be brought in the district in which the defendant resides or transacts business, and process in such case may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any such proceeding brought before it. No costs shall be assessed against the Housing Expediter or the United States Government in any proceeding under this Act.

(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

(5) Federal Rules of Civil Procedure (28 U. S. C. A. fol. 723c):

RULE 13. COUNTERCLAIM AND CROSS-CLAIM.

(h) *Additional parties may be brought in.*— When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

RULE 61. HARMLESS ERROR.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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